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CHILDHOOD, LIKELIHOOD, AND PROBATIVE VALUE: A FURTHER CALL FOR GREATER PROBITY AND LESS CHILDISM IN EVIDENCE LAW

Mae C. Quinn

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CHILDHOOD, LIKELIHOOD, AND PROBATIVE VALUE: A FURTHER CALL FOR GREATER PROBITY AND LESS CHILDISM IN EVIDENCE LAW

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INTRODUCTION

Childism, a term used only recently in United States legal discourse,[1] has been acknowledged in other fields and internationally as akin to sexism and racism.[2] It considers how individuals may be marginalized, excluded, or discounted based upon identity—here, the identity of youthfulness.[3] However, the impact of childism on evidence law has been almost entirely overlooked.[4]

This Essay seeks to further surface and challenge this phenomenon. Specifically, it uses the lens of childism to focus on youth and relevance in three different ways.[5] Part I looks at the current conditions in our courts. When it comes to youth and evidence, a central concern has been whether the condition of youth or youthfulness is relevant to particular legal contexts or questions. These standards have been developed in a piecemeal fashion and apply in only limited instances.

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[1] *See, e.g.*, Mae C. Quinn, Caridad Dominguez, Chelsey Omega, Abrafi Osei-Kofi & Carlye Owens, *Youth Suffrage: In Support of the Second Wave*, 53 AKRON L. REV. 445, 447 (2019) (explaining that childism is not taught in law school as part of critical studies courses); Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity and Sex-Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51, 93 (2014) (urging further consideration of youth insights and ideas as a means to address childism); Molly Smollen, *Redressing Transgression, In Defense of the Federal Sentencing Guidelines for Child Pornography Possession*, 18 BERK. J. CRIM. L. 36, 58 (2013) (arguing that childism may explain lax penalties for the crime of child pornography).

[2] REBECCA ADAMI, CHILDISM, INTERSECTIONALITY AND THE RIGHTS OF THE CHILD 1 (Mark Gibney et al., eds., 2025) (Professor Adami from Stochholm University notes "Childism is a practical concept in critical child rights studies (which is an interdisciplinary field of study ranging from philosophy, psychology, law, sociology, anthropology, and education), that productively merges critical perspectives from childhood studies and prejudice studies with human rights studies."); John Wall, *Theorizing Children's Global Citizenship: Reconstructionism and the Politics of Deep Interdependence*, 9 GLOB. STUD. CHILDHOOD 5, 6 (2019) (noting that childism has been considered within different fields, though sometimes using different vocabulary); Hiraharu Saito, *Bargaining in the Shadows of Children's Custody Disputes: Comparative Analysis of Japan and the United States*, 17 CARDOZO J. DISP. RESOL. 937, 939 (2016) (referring to "childism" as a "recently minted word"); Claudia M. Gold, M.D., *Child Protection and Infant Mental Health: An Essential Partnership*, 115 W. VA. L. REV. 1127 (2013) (discussing childism in the context of infant well-being).

[3] *See generally* Elisabeth Young-Bruehl, *Childism—Prejudice Against Children*, 45 CONTEMP. PSYCHOANALYSIS 251 (2009); ELISABETH YOUNG-BRUEHL, CHILDISM: CONFRONTING PREJUDICE AGAINST CHILDREN (Yale Univ. Press ed., 2012); *see also* ADAMI, *supra* note 2, at 130 ("Childism consists of prejudice, discrimination, or antagonism directed against someone who is between 0–18 years old," or adult superiority).

[4] *See* Mae C. Quinn, *Childist Objections, Youthful Relevance, and Evidence Reconceived*, 127 DICK. L. REV. 535, 547–48 (2023) (offering the first preliminary thoughts on the subject and calling for further evaluation, as in this essay).

[5] *See* FED. R. EVID. 401 (providing the test for relevance is whether proof has "any tendency to make a fact more or less probable"); FED. R. EVID. 402 (describing the default rule of admissibility for relevant evidence).

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Most notably, the United States Supreme Court has applied these standards only to the parts of court proceedings where rules of evidence do not actually apply, such as sentencing proceedings and suppression hearings.[6] Thus, they fail to account for many important situations where the difference of youth may make a difference for evidence, particularly for the main event of trial and required legal elements.

Part II of this Essay offers some ideas for further expanding evidentiary consideration of youth and youthfulness at trial. Specifically, applying the "youth are different" framework, it identifies additional areas where youthfulness as a general condition could be seen as important, in both criminal and civil cases. This includes application to the *actus reus* element in criminal cases, causation considerations in negligence matters, and even "other acts" analysis under Federal Rule of Evidence 404(b). Such expansion, the framework suggests, is one way to more fully develop and advance youth-centered approaches to relevance and evidence law.

Part III warns, however, that even the suggested possibilities set out in Part II are problematic. That is because they are offered here without any direct input from youths themselves. Although I have spent most of my career working on youth justice matters, in juvenile courts, criminal cases, and even before the United States Supreme Court, I am not in the position to speak for young people. Thus, as well-intended as any of my recommendations might be, they too suffer from a top-down, exclusionary, and ultimately childist, orientation.

Part III further argues that if youth-related evidentiary evaluations are to be made with integrity, they must account for the views and vantage points of young people themselves. Doing so might take us in some surprising directions. On the one hand, young people might agree that there are more legal contexts where youth or youthfulness can be seen as relevant. On the other hand, perhaps youths would tell us something else entirely—that is, that they do not see themselves as being so doctrinally different as to make their age relevant to any manner of matter at all. Or perhaps they would argue that adults have it all wrong—as to them, adults, and long-standing norms and assumptions in evidence law.

In the end, this Essay concludes that more work needs to be done at the intersection of youth and relevance. Specifically, it urges more direct engagement

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[6] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 470 (2012) (citing Roper v. Simmons, 543 U.S. 551, 560 (2005) and Graham v. Florida, 560 U.S. 48, 59 (2010) for the rule "requiring sentencing authorities consider the characteristics of a defendant . . . before sentencing him to death."); *id.* at 489 ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

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with young people themselves, and not just as an academic project or clever thought experiment. Having youth at evidence law's table would move us towards authentically ensuring our legal system accounts for youthful experiences and that adults are held more accountable.

To be sure, the long-standing lack of concern for youth as legal stakeholders will require deep and sustained attention to address the pervasiveness of childism in evidence rules and doctrine. And a single essay could never accomplish the kind of fundamental reconstruction necessary to make amends. Instead, this is just one modest contribution, nudging us towards seeing youths as a group as relevant to law and legal institutions, and valuing their insights, wherever they may lead.

I. THE PROBATIVE VALUE OF YOUTH—LIMITED CURRENT CONCEPTIONS

Over the last twenty years, the United States Supreme Court has addressed the question of youth and youthfulness as a relevant consideration in litigation several times. It first did so in the context of criminal legal matters, concluding that a defendant's adolescence is relevant to the question of moral blameworthiness at sentencing.[7] In a series of decisions—*Roper v. Simmons*,[8] *Graham v. Florida*,[9] and *Miller v. Alabama*[10]—the Court constitutionally instantiated the idea that youth as a group are categorically less culpable than adults.[11]

Modern neuroscience and behavioral psychology findings very much shaped the Court's thinking in these cases.[12] Citing experts and studies, the Court described how the brain is not fully developed until adulthood. As a result, young people tend to demonstrate "transient rashness, proclivity for risk, and inability to assess consequences . . . ."[13] And because "[a]n offender's age is relevant" in these ways,

[7] Morgan Tyler, *Understanding the Adolescent Brain and Moral Culpability*, ABA (Aug. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/ [https://perma.cc/RV3C-A768] (analyzing Court's turn towards greater understanding of and empathy for youth).

[8] 543 U.S. 551 (2005).

[9] 560 U.S. 48 (2010).

[10] 567 U.S. 460 (2012).

[11] *See* Tyler, *supra* note 7.

[12] *See Graham*, 50 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *see also Miller*, 567 U.S. at 471–72 (quoting the above language).

[13] *Miller*, 567 U.S. at 472.

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"criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[14] The Court therefore established special considerations for children facing sentencing in the most serious cases.[15]

In constitutionally defining children, the Court opted for a bright-line rule of age eighteen, which includes young children, adolescents, and even older teens.[16] It further held that persons under the age of eighteen at the time of their crime may not be sentenced to death or receive life without parole sentences in non-homicide matters.[17] Beyond this, the Court banned any automatic life without parole sentences for children as a group.[18] Instead, it indicated that evidence relating to youth and youthfulness must be considered and evaluated before determining the correct sentence, even in homicide cases.[19]

During this same period, the Court decided *J.D.B. v. North Carolina*.[20] In that case, the Court declared youthfulness is relevant to evaluating the condition of custody for purposes of *Miranda* warnings.[21] That is, some police encounters will look and feel different to a teenager than to a full-grown adult. Thus, when analyzing the lawfulness of interrogation, courts must account for the point of view of a reasonable child placed in the defendant's situation.[22]

Taken together this body of law is sometimes referred to as the Court's "children are different" jurisprudence.[23] Many scholars and advocates have worked

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[14] *Graham*, 560 U.S. at 76.

[15] *Id.* at 79.

[16] *See* Beth Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. AND C.L. 79, 81 (2013) (explaining that the Supreme Court used age eighteen as the constitutional cut-off between childhood and adulthood).

[17] *See Roper*, 543 U.S. at 578 (holding unconstitutional the death penalty for offenders under the age of eighteen); *Miller*, 567 U.S. at 489 (holding that mandatory life-without-parole sentences for children violates the Eighth Amendment).

[18] *See Miller*, 567 U.S. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[] . . . .").

[19] *See generally* Colgan, *supra* note 16, at 105.

[20] 564 U.S. 261 (2011).

[21] *Id.* at 281.

[22] *Id.* at 271–72.

[23] *See, e.g.*, Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. C.R. & ECON. DEV. 265 (2015) (referencing the Court's "children are different" line of cases and precedent); Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO STATE J. CRIM. L. 71 (2013).

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to bring about greater embrace of this framework in the legal system. They have argued, sometimes successfully, that adult assumptions should not apply, and that youth and youthfulness are relevant to other situations where young people face prosecution.[24]

For instance, some called for youth-focused practices in other sentencing matters.[25] Fruits of this effort can be seen in jurisdictions like Iowa, which now precludes any mandatory minimum sentence for a young person.[26] This is because mandatory minimum sentences do not allow youth to be considered as a relevant factor on the question of the appropriate punishment.[27] Thus, once it is determined that the accused was under age eighteen when they offended, they may not have a mandatory sentence imposed.

Others have argued for consideration of youth not just in the *Miranda* interrogation context, but in suppression hearings raising Fourth Amendment claims. An especially powerful set of arguments have been advanced at the intersection of youth and race, noting how both are relevant to determining whether a young person has been seized by law enforcement.[28] At least some lower courts have embraced this call to expand the "youth are different" framework to jettison an assumed adult worldview of what is relevant to the concept of seizure and arrest.[29]

It is important to note that these "youth are different" evidentiary developments have taken hold in connection with stages of a prosecution where, generally speaking, the rules of evidence do not apply. Yet this has not been meaningfully explored in existing legal scholarship. That is, in federal courts, both sentencing

[24] *See, e.g.*, Kristin Henning, *Criminalizing Normal Adolescent Behaviors in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 449–61 (2013).

[25] *See generally*, *e.g.*, Jyoti Nanda, *Set Up to Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677, 714 (2022); Krisztina Schlessel, *Graham's Applicability to Term-of-Year Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 51027 (2013).

[26] *See* State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014).

[27] *See id.* at 401–02.

[28] Robin Sterling Walker, *"Children Are Different:" Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1062–65 (2013).

[29] *See, e.g.*, Commonwealth v. Evelyn, 152 N.E.3d 108, 117 (Mass. 2015).

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proceedings and suppression hearings need not adhere to the Federal Rules of Evidence.[30] And this set of exemptions exists in most state court systems, too.[31]

A curious evidentiary irony has therefore developed in Supreme Court jurisprudence, declaring that childhood is relevant and matters only when rules of relevance do not matter. But surely youth and youthfulness can have similar significance and salience for more formal parts of a court case, specifically, the main event of trial where the rules of evidence must be followed. Among other things, childhood should have relevance to findings of relevance under Federal Rule of Evidence 401, which considers whether evidence "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."

II. CONSIDERING YOUTH BEYOND SUPPRESSION AND SENTENCING

Without expressly acknowledging this unusual trial versus non-trial evidentiary dichotomy, some have already called for greater embrace of the "youth are different"—or categorically less culpable—framework beyond consideration at suppression hearings or sentencing. This has included scholarship by those who assert that criminal law *mens rea* elements should better account for differences between young people and adults.[32] It has also included the work of advocates, like defenders at the Youth Advocacy Division of the Massachusetts Committee for Public Counsel Services, who developed model youth-specific jury instructions

[30] *See* FED. R. EVID. 1101(b) (describing the parts of a trial to which the rules of evidence apply, expressly listing sentencing as a "miscellaneous proceedings" outside of the strictures of the rules, and noting preliminary questions of admissibility under Rule 104 are similarly exempt); *see also* FED. R. EVID. 104 (describing how a court may take account of information not otherwise admissible at trial when making preliminary admissibility determinations, such as whether a defendant's confession should be suppressed).

[31] *See, e.g.*, MICH. R. EVID. 1101(b)(3) (creating an evidence rule carve out for sentencing hearings); N.C. R. EVID. 1101(b)(3) (same); Matoumba v. State, 890 A.2d 288, 292–93 (Md. 2006) (describing how suppression hearings have been conducted without strict regard for evidence rules under both common law and modern promulgated rules).

[32] *See, e.g.*, Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 539–40 (2016) (further developing claim that youth is relevant to the state of mind element in criminal charges, based upon the Supreme Court's recent embrace of youth as being constitutionally different); Kim Taylor-Thompson, *States of Mind; States of Development*, 14 STAN. L. & POL'Y REV. 143, 162–73 (2003) (calling for "developmental analyses of mens rea concepts" for youthful defendants—even before the Supreme Court fully developed its "youth are different" jurisprudence); *see also generally* Kimberly Thomas, *Reckless Juveniles*, 52 U.C. DAVIS L. REV. 1665 (2019) (proposing that youth should not be charged with crimes rooted in recklessness, in part given that youth are inherently reckless); Christopher M. Northrop & Kristina R. Rozan, *Kids Will Be Kids: Time for a "Reasonable Child" Standard for the Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109 (2017).

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focused on a range of state of mind considerations.[33] Through their work these scholars and advocates have also engaged at least indirectly with the law of evidence as it relates to children.[34]

The *mens rea* arguments described above could be applied to young people facing prosecution in both juvenile and adult court settings. For instance, scholars and others have noted modern neurological discoveries and social science findings demonstrate that children, on average, do not think the same way as most adults in certain situations.[35] Rather, they have asserted young people lack experience, are oriented to the here and now, and tend not to contemplate or fully appreciate the consequences of their actions. If this same analysis was applied to *mens rea* as an element, youth would not possess the actual knowledge, specific intentionality or premeditation required for many criminal charges.[36] This is especially so when considered under the standard of guilt beyond a reasonable doubt.

Accordingly, the current legal landscape obviously results in inconsistencies relating to the relevance of youth. That is, youthfulness as a characteristic is considered relevant to just a few questions but not others. Although significant constitutionally, it is not expressly considered under Federal Rules of Evidence 401 and 402, and similar state rules, for legal case elements or otherwise.[37] This spotty and piecemeal approach, as noted at the outset of this Essay, may be seen as a form of childism. That is, it overlooks the way in which childhood and youthfulness may have significance across other legal domains—discounting and erasing the identity of youth in a range of situations with the use of an adultified lens of analysis.

Just as youthfulness and its characteristics may be relevant to the question of criminal *mens rea*, the same could be said for other criminal law elements. But this has not been fully explored previously in prior scholarship or legal discussions. For instance, as noted, studies suggest that youth tend to focus on immediacy and instant

[33] *See* Committee for Public Counsel Services, Youth Advocacy Division, *Juvenile Specific Jury Instructions* (Sept. 2014) (on file with author).

[34] *See, e.g.*, Jenny E. Carroll, *The Problem with Inference and Juvenile Defendants*, 45 FLA. ST. L. REV. 1 (2017) (using the "youth are different" framework to explain that evidentiary inferences may work differently for youthful defendants and evaluating their state of mind).

[35] *See* Carroll, *supra* note 32, at 541; *see also Graham*, 50 U.S. at 68 (offering as part of its analysis that "parts of the brain involved in behavior control continue to mature through late adolescence").

[36] *See generally* Taylor-Thomas, *supra* note 32, at 1671; Northrop & Rozan, *supra* note 32, at 115.

[37] *See, e.g.*, FED. R. EVID. 401–02 and comments.

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gratification.[38] Relatedly, they can be easily influenced by adult actors and swept up by peer pressure.[39] These phenomena may also be seen as relevant to voluntariness, a concept that is part and parcel of criminal *actus reus* requirements.[40]

Yet in most prosecutions, the voluntariness of an accused's acts is assumed and not meaningfully analyzed by factfinders.[41] And for years, volition has been underdeveloped in legal scholarship.[42] Recently, voluntariness has drawn important renewed attention with a racial-justice overlay bringing important nuance to this question.[43] But again, even this critical approach operates from an adult worldview.[44]

Clearly, youthfulness can raise real doubts about the willfulness of many childhood actions. For example, as was made clear by *J.D.B.*, children can be more easily intimidated than adults.[45] What the Court did not say is that such fear is largely unconscious and may generate automatic responses—such as fight, flight, or freeze—in youth even more than adults.[46] This too is rooted, at least in part, in brain

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[38] *See* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78 (2008); *see also* Graham v. Florida, 560 U.S. 48, 72 (describing most youth as having a fundamental nature that is impetuous and, therefore, likely reckless).

[39] *See also* Miller v. Alabama, 567 U.S. 460, 471 (2012) (noting that both *Roper* and *Graham* acknowledged that youth are "'more vulnerable . . . to negative influences and outside pressures,' including from their family and peers"); *see generally* Dustin Albert, Jason Chein & Laurence Steinberg, *Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCH. SCI. 114, 120 (2013).

[40] *See* Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1545 (2013) ("As any first-year law student can explain, the 'voluntary act requirement' is a foundational component of criminal law.").

[41] *See* Omavi Shukur, *Punishing Involuntary Resistance*, 113 GEO. L.J. 1 (2024) (noting the difference between mens rea and the voluntariness requirement of actus reus, and urging more nuanced analysis relating to the crime of resisting arrest to, in part, account for police brutality against persons of color in this country); *see also* Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY. J. CRIM. L. 340, 342 (2011) (calling for better understanding in criminal law of "how PTSD can invoke automatistic responses through impairments of physiological and neurological functioning brought on by physical and mental adaptations to traumatic stress.").

[42] *See* Shukur, *supra* note 41, at 4–5.

[43] *Id.* at 27–28.

[44] *See generally id.*

[45] *See* J.D.B. v. North Carolina, 564 U.S. 261, 272 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.").

[46] *See, e.g.*, Nicole C. Ferrara, Sydney Trask & J. Amiel Rosenkranz, *Maturation of Amygdala Inputs Regulate Shifts in Social and Fear Behaviors: A Substrate for Developmental Effects of Stress*, 125

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science and adolescent social development findings.[47] Vivid and tragic examples can be seen when children of color are confronted by armed police officers in this country.[48] Accordingly, such situations should present an especially strong argument for factfinders to determine that youth reactions are involuntary, particularly when the standard of guilt beyond a reasonable doubt is applied.[49]

In this same way, youth and youthfulness might also be seen as relevant to the evaluation of causation in criminal matters. Causation in criminal cases generally involves two components—cause in fact and proximate causation.[50] In most instances, the latter is rooted in the concept of reasonableness and foreseeability.[51] Yet here again, even where a factfinder could determine that an adult should have contemplated a particular outcome, the same may not hold for a teen or child. This may apply even beyond recklessness cases, an area that has previously received

NEUROSCIENCE & BEHAVIOR REVS. 11 (2021) (suggesting that studies on different areas of the brain both cortical and amygdala–help explain extreme stress and fear responses on the part of youth that might be seen as maladaptive).

[47] *See, e.g.*, Ferrara et al., *supra* note 46; *see also* Arne Öhman, Katrina Carlsson, Daniel Lundqvist & Martin Ingvar, *On the Unconscious Subcortical Origin of Human Fear*, 92 PHYSIOLOGY & BEHAV. 180, 180–81 (2007) (recognizing the amygdala's role in the "pronounced autonomic activation" of the "startle reflex" that may result in life preserving reactions such as freezing or efforts to escape or attack); Frank Vandevort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335, 356 (2010) (explaining that "one aspect of normal adolescent development is that during these years many youths may experience objectively non-threatening stimuli as a threat.").

[48] *See, e.g.*, Brief of Amicus Curiae Human Rights for Kids in Support of Petitioner, Harris v. State, 276 A.3d 1071 (Md. 2022) (brief written in part by this author and law students, urging court to set aside felony murder sentence where armed officer confronted Black youth in stolen vehicle and youth then reacted by driving forward and striking officer); *see also* Brief of Amicus Curiae for D.C. Justice Lab et al. in Support of Petitioner, Goffin v. Ashcraft, 142 S. Ct. 72 (2021) (brief written by this author and law students, urging rejection of qualified immunity for white police officer who shot fleeing Black suspect in the back, in part based on the rational life-preserving fears on the part of Black suspects in the United States).

[49] Brief of Amicus Curiae Human Rights for Kids in Support of Petitioner, *supra* note 48, at 17–18.

[50] *See, e.g.*, Burrage v. United States, 571 U.S. 204, 210 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.").

[51] *See* MODEL PENAL CODE § 2.03(2)(b) (1985) (asking whether, in determining proximate cause, if the result is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability"); *see also* CRIMINAL LAW 140 (Univ. of Minn. Libraries Publ'g 2015) (noting that legal cause is sometimes described as "objective foreseeability").

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scholarly attention,[52] to any matter where causation for a result is required.[53] And it is especially true given that proximate cause determinations are bound up in notions of moral culpability and where, in fairness, we believe accountability lines should be drawn.[54]

Indeed, many model criminal jury instructions entirely fail to inform jurors that an *actus reus* must be undertaken voluntarily by the defendant.[55] When instructions do mention voluntariness, it is usually in connection with the concept of *mens rea*, such as a further description of the concept of willfulness.[56] And if voluntary *actus reus* is defined, it does not suggest related consideration of adolescent development or evidence of the accused's age—even if involuntariness is framed as a potential

[52] *See generally* Thomas, *Reckless Juveniles*, *supra* note 32.

[53] *See, e.g.*, Stuti S. Kokkalera, Beck M. Strah & Anya Bornstein, *Too Young for the Crime, Yet Old Enough to Do Life: A Critical Review of How State Felony Murder Laws Apply to Juvenile Defendants*, 4 J. CRIM. JUST. & L. 90 (2021) (critiquing felony murder laws that sweep up youth who lack intent or for whom foreseeability does not apply); *cf.* Taylor-Thomas, *supra* note 32, at 1684–87, 1695–97 (critiquing the "natural and probable consequences" doctrine as applied to mens rea evaluations in reckless conduct cases involving youth).

[54] *See* MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW 196 (6th ed. 2021) ("Proximate cause analysis requires the jury to determine whether it is fair or just to hold a defendant legally responsible for an injury or death."); *see also* Tyler, *supra* note 7.

[55] *See, e.g.*, *Pattern Jury Instructions (Criminal Cases)* (2019), https://www.lb5.uscourts.gov/juryinstructions/Fifth/crim2019.pdf [https://perma.cc/SJD5-SSDE] (providing no general definition for voluntary acts as required elements; *Virginia Model Jury Instructions—Criminal* (2024), https://www.vacourts.gov/static/courts/circuit/resources/model_jury_instructions_criminal.pdf [https://perma.cc/365W-JGSH] (same).

[56] *See Pattern Jury Instructions (Criminal Cases)*, *supra* note 55, at 447 (providing guidance to Fifth Circuit district court judges instructing on the federal crime of willful false statements on income tax returns and noting willfully means "voluntary, intentional violation of a known legal duty") (citation omitted); *Virginia Model Jury Instructions—Criminal*, *supra* note 55, at No.29.360 ("A willful act is intentional, or knowing, or voluntary, as distinguished from accidental. . . .").

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defense.[57] The same holds true for jury instructions regarding criminal trial causation determinations.[58]

Evidentiary evaluations in the civil legal system also fail to embrace the Court's "children are different" doctrine and largely ignore the rationales underlying those decisions. For instance, foreseeability and proximate cause also provide the foundation for civil negligence claims.[59] Yet, for accidents and related scenarios, many state laws do not consider adolescent brain development when determining whether a youth is contributorily negligent.[60] Instead, older "rule of sevens" gradations, dating back to biblical text, remain in place in many jurisdictions.[61] In these matters, negligence findings against very young children up to age seven are precluded, but older youth are presumed to think and anticipate the same way as adults.[62]

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[57] *See, e.g.*, *Compendium of the Hawai'i Pattern Jury Instructions—Criminal*, 7.16 (2021), https://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf [https://perma.cc/MM5R-RPXY] ("In any prosecution it is a defense that the conduct alleged in the charged offense does not include a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. A 'voluntary act' means a bodily movement performed consciously or habitually as the result of effort or determination of the Defendant. The burden is upon the prosecution to prove beyond a reasonable doubt that the Defendant's conduct as to the (specify offense) charge included a voluntary act [or the voluntary omission to perform an act of which the Defendant is physically capable]. If the prosecution fails to meet its burden, then you must find the Defendant not guilty of the charge."); *see also Alphabetical List of Instructions of General Applicability*, NY COURTS, https://nycourts.gov/judges/cji/1-General/ALPHA_TOC.shtml (Oct. 16, 2025) (describing involuntariness as a defense and offering as an example that a defendant was given a hallucinogenic drug against their will).

[58] *See, e.g.*, *Connecticut Judicial Branch Criminal Jury Instructions*, 2.6-1 (Dec. 1, 2007), https://www.jud.ct.gov/JI/Criminal/Criminal [https://perma.cc/PHY4-JZMY] (describing the concept of legal causation as a question for the factfinder without mentioning youth or youthfulness as a relevant consideration for the jury).

[59] See Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009) (describing the importance of foreseeability in both the prior torts restatement and current version).

[60] *See, e.g.*, Santor v. Balnis, 199 A.2d 2, 4 (Conn. 1964) (holding that once a child turns 16 years of age, they can be held to the same negligence per se standard as adults—while the actions of younger children are to be measured by conduct of youth of the same age); Johnson v. Safeway Ins. Co., 741 So. 2d 32, 33–34 (La. Ct. App. 1999) (explaining where an automobile hit and injured group of youth walking on the side of an unlit roadway, court set aside 50% contributory negligence finding against driver and instead found 12-year-old plaintiff to be wholly at fault as the "teenage pedestrians breached their duty of care" by not complying with state law relating to pedestrians).

[61] COMPARATIVE NEGLIGENCE MANUAL § 10:12 (3d ed. 2025).

[62] *See generally* COMPARATIVE NEGLIGENCE MANUAL, *supra* note 61 (noting the historic rule of sevens comes from the bible and still applies today in many negligence matters). *See also, e.g.*, Cook v. Ford

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The recently amended Restatement of Torts suggests a more nuanced approach to age and negligence. Specifically, comments to the *2010 Restatement (Third) of Torts* advise modern courts to consider "whether the child has made reasonable choices and engaged in reasonable behavior, given the limitations that childhood imposes[]" before determining whether a youth's own negligence should be used against them.[63] However, rather than apply a general standard of grace or reduced culpability analysis for all youth under age eighteen, the Restatement establishes an adultified rule that holds children over age five accountable for their actions if their conduct does not conform to the conduct of youth of similar age, intelligence, and experience.[64]

Indeed, while the rule itself suggests that the child's conduct will be measured against that of other children to determine reasonableness, its comments suggest something altogether different. Rather, they singularly focus on an assessment of the child-in-question's age, characteristics, and attributes without discussing evidence of youth as a class or the meaning or significance of youthfulness more generally.[65] Specifically, the comments note that "[e]vidence that relates to the child's overall level of intelligence or sophistication is clearly relevant."[66]

Moreover, the *Restatement (Third)* has retained an exception for young people who engage in an "adult" activity, described as actions like driving a car or using a gun.[67] Such youth, it states, should be wholly saddled with adult duties of care and foreseeability standards.[68] This surely fails to embrace the Supreme Court's reduced culpability analysis based on youth being impetuous risk-takers, a rule developed in cases where youth were clearly involved in dangerous activities that not just

Motor Co., 913 N.E.2d 311, 329 (Ind. Ct. App. 2009) (applying historic "rule of sevens" which barred children under 7 from being held responsible for their actions, allowed a rebuttable presumption against negligence for youth ages 7 to 14, and presumed youth over age 14 to be fully accountable like adults).

[63] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 10 Children, cmt. b (AM. L. INST. 2010).

[64] See *id.* §§ 10(a)–10(b).

[65] *See id.* at cmt. c (explaining that "[e]vidence bearing on the issues identified in Subsection (a) can come from those who know the child, including parents and teachers; it can also come directly from the child").

[66] *Id.*

[67] For some reason, golfing is also considered an "adult" activity under the Restatement, while skiing is not. See *id.* at cmt. f.

[68] *Id.* § 10(c) (creating exception for any child who "is engaging in a dangerous activity that is characteristically undertaken by adults," with comments referencing activities such as driving and shooting a gun); *see also* RESTATEMENT (SECOND) OF TORTS § 293A cmt. c (AM. L. INST. 1965) (indicating that a child who undertakes conduct that is intended for adults, such as driving a car or flying an airplane, "may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity").

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threatened but took the lives of others.[69] It also disregards recent recommendations that call for more robust legal protections for youth based on their inherently reckless actions.[70] Indeed, comments to the *Restatement (Third) of Torts*, addressing children who cause physical or emotional harms, plainly state that "adolescents display a preference for risk-taking, deriving special pleasure from behaving in certain risky ways; these are pleasures that negligence law tends to disregard."[71]

Other areas of tort law contribute to the inconsistent state of affairs regarding the relevance of youthfulness to litigation. For instance, a parent generally is not responsible for tortious harms caused by their child.[72] However, courts apply an exception in cases where it is said that a child has a "propensity" for "vicious" conduct or other activities that may place persons at risk.[73] In those cases, parents may be held liable for the acts of their child because, as the theory goes, they were on notice about the child's proclivities.[74] But such a propensity exception swallows the non-liability rule. That is, if we agree with modern scientific findings and the Supreme Court's analysis that adolescents are generally prone towards risky and dangerous behavior, parents will always be liable for their teen children.

The Court's "youth are different" analysis and social-scientific studies in support thereof have salience for other cross-system evidence questions, too. For instance, in both criminal and civil matters, Federal Rule of Evidence 404(b) allows for "other acts" to be admitted to help prove certain issues at trial.[75] Under Rule 404(b), relevant matters such as motive, intent, mistake, identification, or common plan might be demonstrated through the introduction of evidence that a party or witness had engaged in some similar activity before.[76]

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[69] *See generally, e.g.*, Miller v. Alabama, 567 U.S. 460 (analyzing two different youth defendant cases—both involving teen activities that resulted in death of another).

[70] *See* Taylor-Thomas, *supra* note 32, at 1691.

[71] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 10 Children, cmt. g (AM. L. INST. 2010).

[72] Rivers v. Murray, 29 A.D.3d 884, 884 (N.Y. App. Div. 2006).

[73] *See, e.g.*, Dinsmore-Poff v. Alvord, 972 P.2d 978, 980–81 (Ala. 1999) (determining parents should have been on notice of child's dangerous propensities but denying relief on other grounds); Williamson v. Daniels, 748 So. 2d 754, 760 (Miss. 1999) (focusing on whether the child had a "propensity to do harm"); *Rivers*, 29 A.D.3d at 884–85 (evaluating whether a child's prior actions suggested violent propensities).

[74] *Williamson*, 748 So. 2d at 759–60.

[75] Michael D. Cicchini, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 354 (2018).

[76] *See, e.g.*, *id.* (arguing that jurors tend to overvalue evidence of past wrongs when determining if a defendant is guilty of the crime at hand).

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Here again, the assumptions underlying the "other acts" evidence exception are rooted in our understanding of how grown adults live and behave. Even in cases involving adults, many have noted the tenuous nature of conclusions jurors may draw from prior out-of-court conduct and the danger of drawing erroneous parallels based on propensity or general character proof.[77] Surely such Rule 404(b) inferences and connections are even more speculative and questionable when it comes to young people.[78] Yet, neither the rule, nor cases interpreting it, have considered this possibility.[79] Moreover, Rule 403's concern for undue prejudice—often seen as a policy-based corrective when other rules do not sufficiently preclude evidence—is especially salient in cases when the "other acts" proof is being introduced to explain the behavior of a child.

However, it is important to acknowledge that the Supreme Court's jurisprudence has merely produced a baseline categorical rule, providing that once proof of youth is clear, the default adult-centered rule does not apply. Open questions remain about next steps from an evidence law perspective once the categorical carve-out has been triggered. That is, what evidence, specifically, should be considered to determine whether the young person was, in fact, in custody.[80] And in the case of a youth found guilty, what evidence is relevant to the question of what lawful sentence should be imposed.[81] In other words, from an evidence law perspective, it is not entirely clear how and to what degree the young person's actual age and level of

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[77] *See generally*, *e.g.*, Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 FORDHAM L. REV. 2441 (2024) (critiquing Federal Rule of Evidence 404(b) as being too inclined towards admissibility, and recommending that the Federal Rules of Evidence be altered to exclude past acts which could be used to draw conclusions on defendant's propensity or character); Demetria D. Frank, *The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence and the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1 (2016) (discussing Federal Rule of Evidence 404(b)'s disproportionate negative impact on non-white defendants, as past actions may be admitted as evidence despite their prejudicial tendency); Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R. & C.L. REV. 519 (2015) (emphasizing the potential harm caused by allowing past convictions to be admitted into evidence, especially for defendants who are non-white, indigent or have previous drug-related convictions).

[78] *Cf.* Carroll, *supra* note 34.

[79] *See generally* FED. R. EVID. 404(b).

[80] *See generally* Tonja Jacobi, *The Law of Disposable Children: Interrogations in Schools*, 75 ALA. L. REV. 291 (2024) (analyzing how courts determine if a school student was in custody for purposes of *Miranda* during an interrogation taking place at school and in the presence of school administrators or police officers stationed at the school).

[81] *See* Montgomery v. Louisiana, 577 U.S. 190, 194 (2016) (suggesting that were defendant not subject to a mandatory sentence of life without the possibility of parole, the court may have considered in determining defendant's sentence his "young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation.").

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development should be assessed when making an ultimate determination on custody or culpability.[82]

Relatedly, applying some version of the "children are different" doctrine to every legal question or issue presented to a factfinder presents challenges and problems, too. One significant concern with this approach—as later addressed in this Essay—is that young people themselves have not asked for this to happen. Taking steps to further instantiate differences between those older and younger than age eighteen, in fact, may have a range of negative consequences, consequences that many young people themselves may not desire. Thus, in the name of seeking to undo our nation's history of childism in the law, proposals made without youthful input may simply advance the problem but in a different form.

III. WE ARE ALL CHILDISTS NOW: YOUTH PARTICIPATION IN EVIDENCE LAW

By way of example, drawing a line at age eighteen as an evidentiary cut-off may produce childist harms.[83] Such an approach fails to recognize that some individuals will not fully develop cognitively, morally, and emotionally until well into their twenties.[84] Thus, the importance of their youth is excluded by way of a bright line rule they did not request. And their still ongoing development is not considered.[85]

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[82] *See generally* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565 (2019) (recounting how jurisdictions around the country have struggled for years to interpret and implement the requirements of *Miller v. Alabama* in youthful offender resentencing hearings, parole proceedings and new legislation).

[83] *See, e.g.*, Christopher D. Berk, *Children, Development and the Troubled Foundations of* Miller v. Alabama, 44 L. & SOC. INQUIRY 752, 767–68 (2019) ("[B]y conflating political choices with empirical description we are left with narrowed and confused grounds to define and assert the rights of children in the criminal law.").

[84] *See From Youth Justice Involvement to Young Adult Offending*, NAT'L INST. JUST. (Mar. 10, 2014), https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending [https://perma.cc/Z6DJ-H7PV] (noting that "researchers concluded that young adults ages 18–24 are more similar to juveniles than to adults with respect to their offending, maturation and life circumstances").

[85] *Id.* (suggesting that the minimum criminal court referral age is raised to somewhere between age 21 and 24); *see also* ASHLEY NELLIS & NIKI MONAZZAM, LEFT TO DIE IN PRISON: EMERGING ADULTS AGE 25 AND YOUNGER SENTENCED TO DIE IN PRISON (Sentencing Project 2023) (urging that "states should, at a minimum, eliminate the use of life without parole for people 25 and younger"); Thomas Salazar, *The Myth of Youth: Rethinking the Negligence Standard of Care for Minors in the Age of Neuroscience*, 54 U. PAC. L. REV. 141 (2023) (suggesting that neuroscience supports extending to age 25 any relaxed standard of care that might be applied for young people in the negligence context).

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This said, evaluating every child's subjective stage of development as it relates to every legal issue before the courts is also an impossible—if not inhumane—task.[86] There are simply not enough neuroscientists and psychologists to engage in such efforts. Funding does not exist to support such work. And few would argue that every child should be subjected to the stress of a brain scan for the purpose of ruling on a relevance objection.[87] Indeed, young people themselves may be the most likely to resist such a course. Thus, all of this presents different conundrums for challenging childism in the courts.

Most fundamentally, continually declaring "children are different" throughout the course of a trial—including in jury instructions—could have the tendency to harmfully stereotype young people as incapable subjects. Making blanket assumptions about how young people as a class behave—or do not behave—can wrongfully reduce minors to an incapable monolith.[88] Such essentializing may discount their actual desires and the very real capacities that they do have.[89]

That is, even if well-intended, all the proposals offered above represent an adult point of view. That is, they lack direct youthful input. And just because I once was a child does not mean that presently I stand in the shoes of a young person. Nor does three decades of work as a youth advocate give me special license or privilege to speak for all young people. As organizers, activists, and critical scholars have long

[86] *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009) (cataloging various shortcomings of the "children are different" doctrine—both as a matter of legal analysis and application).

[87] *See, e.g.*, Aliza Milner, *Walking the Line: Tracing the Science of* Miller v. Alabama *in State Appellate Opinions*, 2 SYRACUSE J.L. & CIVIC ENGAGEMENT (2015), https://slace.syr.edu/walking-the-line-tracing-the-science-of-milner-v-alabama-in-state-appellate-opinions/#_ftn1 [https://perma.cc/UC8T-KL84] (suggesting that past judicial analysis of the science in *Miller* is too generalized and raising the question of how more nuanced application might occur in the future).

[88] *See* Annette Appell, *Accommodating Youth*, 19 CARDOZO J.L. & GENDER 715, 717 (2013) (warning of the ways that children may be socially and legally constructed as "unwise, vulnerable and incompetent" in a manner that is "natural and inevitable" without meaningful justification).

[89] *See* Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. REV. 1055 (noting the need for striking a balance between supporting youthful agency and protecting them from the world's harms); *see also* Meghana Bharadwaj, *Are Kids Exceptional?: Juvenile Exceptionalism in Slavery and Prison Abolition* (work in progress—forthcoming publication) (highlighting possible negative impacts of exceptionalist thinking about children).

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acknowledged, for law reforms to have real meaning and integrity, they must include inputs and insights from the people they are most likely to impact.[90]

Yet, to date, most critical theoretical discussions and approaches have not specifically called for youth involvement as impacted stakeholders or attempted to include youth perspectives.[91] Instead, the adult vantage point is at the center of nearly all conversations. This is so even when it comes to calls for improving evidence law.[92] Thus, young people have not only been left out but inadvertently rendered mostly invisible even by those urging rethinking, fairness, and equity.[93] But in the name of procedural probity, youth themselves must be seen, heard, and have a seat at evidence law's table.[94]

On the international front, the idea of youth participation in government and legal affairs has long been embraced.[95] In 1989, the General Assembly of the United Nations ("U.N.") adopted the Convention on the Rights of the Child ("CRC").[96] It mandates that signatory states "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[97] At first it was believed this applied only to testimony of

[90] *See, e.g.*, JAMES CHARLTON, NOTHING ABOUT US WITHOUT US (1998) (advancing a "philosophy of empowerment" and arguing that persons with disabilities know what is best for themselves, though offered almost exclusively from an adult perspective); CRITICAL RACE THEORY (Kimberlé Crenshaw et al. eds., 1995) (a collection of essays, written by adult scholars and calling for, among other things, greater recognition of the lived experiences of persons of color in law and society).

[91] *See, e.g.*, CHARLTON, *supra* note 90; CRITICAL RACE THEORY, *supra* note 90.

[92] *See, e.g.*, Jasmine Gonzalez Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2311 (2017) (calling for, among other things, more "people of color to share their experiences of minority racialized reality" to "increase racial equity in the courtroom"); Julia Simon-Kerr, *Relevance Through a Feminist Lens*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364, 366 (Christian Dahlman, Alex Stein & Giovanni Tuznet eds., 2021).

[93] *See* Anette Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1139 (noting how day to day activity in our world unintentionally "constructs children as categorically unequal to adults and creates inequality both among children and between children and adults").

[94] *See* Quinn, *Childist Objections*, *supra* note 4, at 538; Quinn, *Policing Puberty*, *supra* note 1, at 54–55; Quinn, *Youth Suffrage*, *supra* note 1, at 477.

[95] Quinn, *Policing Puberty*, *supra* note 1, at 95–96.

[96] U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[97] *Id.* at 48.

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youth in cases impacting their lives.[98] But over time it was interpreted as an "extremely emancipatory" provision granting broad "participatory rights" for young people across all manner of domains.[99]

In 2003, the U.N. issued General Comment 5 to help countries interpret and implement the CRC. Comment 5 powerfully declared: "It is important that Governments develop a direct relationship with children."[100] In doing so, it urged governmental entities to hear from youth themselves—and not just parental or advocate proxies—when creating laws and procedures that might impact young people to ensure their direct involvement in decision-making processes.[101] Similarly, in 2009, the U.N. issued General Comment 12, clarifying the CRC's commitment to "foster children's participation" in world affairs more broadly, providing a range of examples where adult government actors could meaningfully account for the views and opinions of youth.[102]

Unfortunately, to this day, the United States has not agreed to abide by its directives.[103] Still, starting about twenty years ago, some youth advocates began to more vocally call for United States CRC ratification,[104] or alternatively, adherence

[98] Leanne Johnny, *Reconceptualising Childhood: Children's Rights and Youth Participation in Schools*, 7 INT'L EDUC. J. 17, 22–23 (2006) (arguing that while the CRC does grant youth some participation rights in matters which will impact them, this participation does not fully realize what the child liberationist movement had advocated for, despite acknowledging that children are capable of making rational decisions).

[99] *Id.* (describing how the CRC could be further expanded to give youth a voice within the institutions which directly impact their lives, such as schools).

[100] Comm. on the Rts. of the Child, General Comment No. 5, General Measures of Implementations of the Convention on the Rights of the Child, Thirty-Fourth Session, at 5, U.N. Doc. CRC/GC/2003/5 (2003).

[101] *See id.*

[102] Comm. on the Rts. of the Child, General Comment No. 12, The Right of the Child to be Heard, Fifty-First Session, at 21–29, U.N. Doc. CRC/C/GC/12 (2009).

[103] Quinn, *Policing Puberty*, *supra* note 1, at 96 (describing the United States as extreme national outlier in failing to adopt the CRC); *see also* Jacqueline Frank, *The International Convention on the Rights of the Child and Juvenile Justice*, 40 WIS. INT'L L.J. 143, 145 (2022) (same).

[104] *See, e.g.*, *The Campaign for US Ratification of the Convention of the Rights of the Child*, CONN. GEN. ASSEMBLY (Mar. 2013), https://www.cga.ct.gov/2013/kiddata/tmy/2013SB-00021-R000305-Meg%20Gardinier,%20Campaign%20for%20the%20US%20Ratification%20of%20the%20Convention%20on%20the%20Rights%20of%20the%20Child-TMY.PDF [https://perma.cc/UPH5-TEVP]; Richa Mathur, *The UN Convention on the Rights of the Child: Why Federal Rights for Children are Important*, FIRST FOCUS ON CHILDREN WEBSITE (Nov. 2016), https://firstfocus.org/wp-content/uploads/2016/11/UN-Convention-Child-Rights-Fact-Sheet-1.pdf [https://perma.cc/4NGE-5VJ8].

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to its principles.[105] Relatedly, during this period, the federal Office of Juvenile Justice and Delinquency Prevention started to condition state funding upon inclusion of youth members in juvenile justice advisory groups.[106] And groups like Our Children's Trust, founded in 2010 by attorney Julia Olsen, placed real youth and their experiences at the center of litigation and advocacy.[107] This can be witnessed in the documentary film, *Youth v. Gov*, which powerfully tracks the organization's work in the case of *Juliana v. United States*, a federal environmental justice matter filed in 2015.[108]

In the last decade, more law scholars and advocates have joined these conversations. And over the last year or so, a flurry of new legal scholarship has added to the power of this movement in the United States, urging more youth engagement in law reform and legal institutions.[109]

This is not to say that it will be an easy task to truly involve young people to ensure evidence law reflects their viewpoints. Given current conceptions of child

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[105] *See, e.g.*, Quinn, *Policing Puberty*, *supra* note 1, at 96; *see also Toolkit for the Adoption of the Convention on the Rights of the Child by City Councils and State Legislatures* (2009), https://wwws.law.northwestern.edu/legalclinic/cfjc/documents/crc-toolkit-11-2009.pdf [https://perma.cc/EC4Q-KNEF] (document created by Northwestern University School of Law's Center for International Human Rights and Children & Family Justice Center); Marit Haugen, *The Last One Standing: How the United States' Decision Not to Ratify the Convention on the Rights of the Child Impacted Its Juvenile Mental Health Courts in Comparison to Canada*, 39 ARIZ. J. INT'L & COMP. L. 201, 207–09 (2022).

[106] *See, e.g.*, *OJJDP's State Relations and Assistance Division Holds Training Conference*, OFF. JUV. JUST. & DELIQ. PREVENTION (Sept./Oct. 2007), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/news_at_glance/219940/sf_4.html [https://perma.cc/RF5B-9RWM] (describing specialized training provided for youth members of state advisory groups).

[107] *Julia Olson (She/Her)*, OUR CHILDREN'S TRUST (2025), https://www.ourchildrenstrust.org/julia-olson [https://perma.cc/98EN-JGKM].

[108] *See Misson*, OUR CHILDREN'S TRUST (2025), https://www.ourchildrenstrust.org/mission-statement [https://perma.cc/Y82K-HVEF] ("Our Children's Trust is a non-profit public interest law firm that provides strategic, campaign-based legal services to youth from diverse backgrounds to secure their legal rights to a safe climate."); Christi Cooper & Olivia Ahnemann, YOUTH V GOV, https://www.youthvgovfilm.com/ [https://perma.cc/W34W-PJPX].

[109] *See* Sarah Medina Camiscoli, *Youth Movement Law: The Case for Interpreting the Constitution with Mobilized Youth*, 26 J. CONST'L L. 1558, 1616 (2024) (encouraging the use of youthful "dialogic partners" in scholarly, advocacy and other initiatives); Jeremiah Chin, *The Next Generation*, 112 KENTUCKY L. REV. 729, 732 (2024) (noting, among other things, that "allowing youth to participate in local government recognizes the importance of community and place that are shared among all residents of a state, but have special importance to youth."). This said, in the United States, "childism" as a term still has not taken hold in this scholarship. *Cf.* Rebecca Adami, *Childism: How Discrimination Against Children Plays Out in Law*, THE CONVERSATION (Apr. 20, 2023), https://theconversation.com/childism-how-discrimination-against-children-plays-out-in-law-199454 [https://perma.cc/59A3-NQYX] (critiquing lack of youth engagement in Sweden through the lens of childism).

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protection law in the United States, for instance, contacting and including youth in conversations about their own interests generally requires guardian consent and satisfaction of other complicated legal requirements.[110] Accounting for the interests and desires of very young children may be especially challenging.[111] Thus, patience, fortitude, sustained effort, and a great deal of new thinking will be required for a shift that involves youth participation as a matter of course.[112] Moreover, even if legal approvals are obtained, simply inviting a few teens to join a longstanding, adult-dominated legal discussion is likely to be insufficient and unsuccessful.

To be sure, this Essay does not purport to have all of the answers or suggest that such methods will ever be perfect or challenge-free. But United States governmental bodies, including evidence rules drafting committees, could look to the ideas and efforts already developed in other countries to help implement CRC principles and work to undo childism's effects.[113] In addition, to help young people feel prepared for the task of engaging in such conversations, the law of evidence, along with criminal and civil procedure, could be taught in this country in the K-12 space.[114] Similarly, affording more law-based internships to teens would also help to

[110] *See, e.g.*, *Minor Consent and Confidentiality: A Compendium of Federal and State Law*, NAT'L CENT. FOR YOUTH L., https://youthlaw.org/sites/default/files/2024-10/NCYLMinorConsentCompendium2024.pdf [https://perma.cc/L4ZX-XVSL].

[111] *See* Annette Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1969 (1996) (noting that very young children are unable to direct attorneys intended to represent them).

[112] In a work in progress, *Against Child Protection*, I address some of these issues based upon my experiences partnering with youth on legislative initiatives in Missouri, involving them in academic conferences, filing United States Supreme Court Amicus briefs where youth were included as named friends of the court, engaging with university child-protection protocols at several institutions, and navigating challenges around just conversing with youth to help inform legal scholarship recommendations.

[113] *See, e.g.*, Donna J. Martinson, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 31 CAN. J. FAM. L. 151 (2018) (analyzing how children should be represented in family court proceedings consistently with CRC requirements including independent representation for children in family court matters and consideration of the child's perspective, should he or she wish to provide it); Laura Lundy, *"Voice" is not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child*, 6 BRIT. EDUC. RTS. RSCH. J. 927 (2007) (providing concrete guidance for governmental stakeholders seeking to deploy CRC youth participation principles).

[114] *See* Mae C. Quinn, *Noticing Injunctions*, 59 RICH. L. REV. 447, 455–56 (2025).

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normalize the notion of youth being present in and contributing to law-related spaces previously dominated by adults.[115]

With young people involved in the process of shaping evidentiary rules and interpretations, the legal system's understanding of youth and youthfulness will be less rooted in arms-length assumptions and distant recollections. Instead, they can be informed by the ideas and insights of today's young people, here and now. But in making this change, we, as adult stakeholders in the legal system, will also need to prepare ourselves. That is because it is entirely possible that youth may not agree with all that we say, or have said, in the name of children and young people. And this may happen in ways great and small.

As suggested above, some youth may resist expansive framing of youth as a relevant factor if it leads, overall, to young people being cabined based on alleged limited capabilities. They may tell us that, in fact, they believe their age and youthful mindset is less relevant to some legal questions than we previously believed. Alternatively, they may suggest additional logical connections or disconnections based upon their own youthful world view that conflict with adult conceptions of what may, or may not, make a claim more likely in a given situation.

Or perhaps, more basically and importantly, young people will contest adult assumptions baked into evidence law's foundations, such as the immutability of character traits, that lawyers rather than judges drive what evidence is presented at trial, or that seeking truth should be secondary to adhering to a fact-finding process littered with complicated rules of exclusion. As jarring as these possibilities may be, critical theory would seem to invite their consideration. Probity of process and respect for youth as stakeholders may demand it. And overcoming childism, in evidence law and beyond, may require an entirely new world order.

CONCLUSION

Children and their experiences are as important as those of adults. Yet, to date, the law has failed to account for this. These failings may be seen as a form of childism. Childism and an adult vantage point not only permeates substantive law in the United States, but the very processes by which cases in our courts are evaluated, including the rules of evidence in federal and state courts. The United States Supreme Court has developed the "youth are different" doctrine to underscore the relevance of youth and accounting for how young people may think and act differently. But

[115] This is a practice I adopted as the founding director of the MacArthur Justice Center in St. Louis, inviting several local high school students to serve as interns with our office as it engaged in civil rights litigation. One of those high school students, Meghana Bharadwaj, is an emerging legal scholar cited in this Essay.

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ironically, these holdings currently apply only to instances where the rules of evidence do not apply.

This Essay offers some possible ways for the "youth are different" doctrine to be further expanded, beyond the limited manner in which some lower courts have done so, and other writers have argued to date. But even my suggestions as youth advocate and scholar suffer from a childist approach as they have not been informed by or offered by young people themselves. Thus, this Essay urges greater involvement of young people in all kinds of conversations about the law as written and applied, including the rules of evidence. Such collaborative endeavors may be challenging for a host of logistical and other reasons.

In the end, we, as adults, may have many of our assumptions about children and childhood challenged by providing them a seat at the table. But the fundamental probity of law and legal institutions requires our making room for such possibilities—for the concept of probative value and so many other things.

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